No. 5277

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 7

LESLIE-CALIFORNIA SALT COMPANY
(a corporation),

Appellant,

vs.

D. L. LARKIN,

Appellee.

BRIEF FOR APPELLEE.

BELL & SIMMONS,
Alaska Commercial Building, San Francisco,
W. S. ANDREWS,
260 California Street, San Francisco,
GOLDEN W. BELL,
Alaska Commercial Building, San Francisco,
Proctors for Appellee.

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Table of Contents

Table of Authorities Cited

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I.

THIS COURT WILL NOT DISTURB THE FINDINGS OF THE DISTRICT COURT—PARTICULARLY WHERE THE RECORD BEFORE THIS COURT IS INCOMPLETE.

It is sufficient to affirm this very simple case of fact that all of the testimony was taken in the presence of the District Judge, and that this Court, as it has frequently said, will not disturb his findings made on conflicting evidence taken before him:

Cary Davis Tug & Barge Co. v. Commercial Boiler Works, 1927 A. M. C. 1874, C. C. A. 9.

> "The findings of that court, based as they were on competent testimony, will not be disturbed on

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*Appellee's italics unless otherwise noted. Numerals refer to pages of Apostles unless otherwise noted.

Apostles, page 42, line 6: "pier 26" should be "pier 23"; line 28: "wheel" should be "way".

appeal in the absence of some plain or obvious error, and none such is here apparent."

F. J. Luckenbach, 1925 A. M. C. 1551 at 1553; 8 Fed. (2nd) 223, C. C. A. 9;

Bangor, infra; 212 Fed. 706, C. C. A. 2.

This principle is peculiarly applicable in this instance because appellant, on cross-examination of appellee's master, Hampton, (44) and disinterested witness Davis (55) exhibited to them a photostatic enlargement of a chart and had them point out thereon, *without in any way marking on the chart* the points to which reference was being made: the place where the collision took place, the positions and courses of the two colliding vessels at divers times, the position of the third vessel, "Henrietta", and Davis at pier 23, etc. (44, 45, 46, 47, 48, 55, 56). Appellant used the same method in directly examining its witness, Engstrom (67), and appellee followed it on the cross-examination of Thompson (62), and the rebuttal of Hampton (69). Likewise, the angle of collision was indicated to the District Judge by the justaposition of physical objects (47, 48, 69), of which *no diagram was preserved.*

Thus these facts were *visually demonstrated* to the observant District Judge, who fully comprehended them; but no record of the demonstrations was preserved, so that *the most important testimony in the case is not and cannot be before this Court.* Indeed, as the photostatic chart was not offered in evidence, even *it* is before this Court only by virtue of appellee's stipulation (75). "Here", "there", "that angle",

"this way", "like this", "this direction", "like that" are *entirely meaningless* in the absence of markings on the chart:

> "Sometimes they say 'here' or 'there', but there is nothing to indicate that either the 'here' or the 'there' was marked on the chart. It is always desirable that such indefinite statements should be made definite by a mark on the chart and a letter or number."
>
> *Catawissa,* 213 Fed. 14 at 16, C. C. A. 2.

What Lacombe, Circuit Judge, said in that case, in which some letters had been placed on the chart, but the chart was not before the Court, applies precisely to the case at bar:

> "Speaking solely for himself, the writer would be inclined to the opinion that the Catawissa was free from fault, *if* 'A', 'B', 'C', and 'X' were where from the rest of the testimony he *infers* they were; but he *cannot rely on his inference to reverse the findings of the District Judge, who knew just where they were.* Therefore he concurs with his associates, who are satisfied from the record as it stands that the Catawissa had sufficient space to pass, if carefully navigated, and therefore must be held in fault."
>
> *Ibid,* at 16.

It is incumbent upon any party who appeals to have seen to it that the record in the trial Court is intelligible to the Appellate Court which he requests to review the case.

II.

THE "PYRAMID" WAS PLAINLY AT FAULT IN SEVERAL RESPECTS.

A. In Shaving the Pier Ends.

The answer to the libel (17) and the cross-libel (22) both allege that when the "Pyramid" left her mooring on the north side of pier 17, "she backed out into the stream to a point *about 70 feet away from the end of pier 17,* where she backed and turned so that her bow was headed to the north". Her master's testimony sought to increase this distance to 150 feet (58, 62). In any event, she was bound for the south side of pier 25; and after she had backed to such point off pier 17, she set a course *to shave the northeast corners of piers 21 and 23* (62, 58, 59). The tide was flooding, about an hour and a half before high water (42, 43, 62), so that it was *running against the starboard* side of the "Pyramid" and carrying her continually nearer to the northeast corner of pier 21 (62, 42, 45). Therefore, not only was the *course* of the "Pyramid" from the point to which she backed from pier 17 taking her always closer to that corner of pier 21, but the *flood tide* was always setting her over toward that corner of that pier as she pursued her course. Moreover, the "Pyramid" was *not properly answering her helm* (58).

The considered allegation in the answer (17) and the cross-libel (22) that the "Pyramid" backed to a point only *about 70 feet from the end of pier 17* should be, and probably was by the trial judge who saw the witnesses, accepted against her master's subsequent estimate of 150 feet (58, 62). In any event, when she

passed the end of pier 21 she was *"less than 50 feet" from it,* as the District Court found (70). The only *disinterested* witness, Davis, said that the collision occurred "less than 50 feet" off the end of pier 21 (54). The "Four Sisters' " master said that when the bow of the "Pyramid" "bobbed around the end" of pier 21, the "Pyramid" was *"not more than 20 or 25 feet" from the end of it* (42). The testimony of the "Pyramid's" master corroborated by that of her engineer (65), indicates that she *almost struck the end of pier 21,* as he says that he *"swung off about 10 feet from the dock"* (58), although later he "figures" and "guesses" that she was about 60 feet off the end of pier 21 (59, 61, 62). The testimony, therefore, more than justifies the conservative finding of the Court that the "Pyramid" was *"less than 50 feet"* off the end of pier 21—and here it is to be noted that the Court said "less than 50 feet" (70), *and not,* as appellant's brief states "less than 500 feet" (Brief for Appellant, 7).

It is also to be noted, in reference to the statement on page 22 of appellant's brief to the effect that "the 'Pyramid' was about a hundred feet out from the wharf, which point marks the scene of the collision", *that it does not mean* about 100 feet east of the *end* of pier 21, but about that northeast of the *north side* of that pier (46, 47). In other words, when appellant asked Hampton where the collision took place, the latter *pointed to the photostatic chart* and said "About here", and when appellant then asked "Was it about 100 feet *from the wharf?"* answered *"Possibly.* The 'Pyramid' was coming *kind of in this way"* (46). But

just before the collision *neither* boat was that far from pier 21. The "Pyramid" passed within *from 10 to less than 50 feet* of the east end of pier 21, as has been shown. As the "Pyramid" bobbed around the northeast corner of pier 21, the "Four Sisters" was about *60 feet west* of the end of pier 21 (59, 46, 47, 55) and *30 feet from the north side* of that pier (45).

At that time, then, the two vessels were *about 75 feet apart* (Brief for Appellant 22), *"not more"* (46), the "Four Sisters" being only 30 feet from the north side of pier 21, and the "Pyramid" being from 10 to less than 50 feet from the east end of that pier. *The "Pyramid" was on a slanting course, cutting the northeast corner of pier 21* when she saw the "Four Sisters", and reversed and ported her own helm, with the result that *her bow swung to port* (63), *toward the other vessel* and the slip between piers 21 and 23. The "Four Sisters" was on a course about parallel with the north side of pier 21, and when she saw the "Pyramid" bob around the northeast corner of that pier, *backed and swung her bow to port* (42, 69, 48, 51), *away from the other vessel* and also away from the north side of pier 21. As there was headway on both vessels they were *"possibly"* about 100 feet from the *north side* of pier 21 before they came together. The point of collision, therefore, was *probably west of the eastern end of pier 23, and in any event less than 50 feet east of it* (54, 55).

1. So Violating a Rule of the California State Harbor Commission.

From what has been said, it is clear that the steamer "Pyramid" violated the Harbor Commission rule of

30 years' standing (36), *expressly pleaded in the libel* (9), providing that:

> "Vessels must not run within 500 feet from and parallel to the pier head line" (9, 37).

That rule, on the face of it, is a *reasonable and essential regulation,* and its observance by the "Pyramid" unquestionably would have prevented her from running down the "Four Sisters". Her violation of the rule plainly caused the collision. Even were that not clear, since she was in actual violation of the rule at the time of the collision, she was presumptively culpable and therefore under the burden, which obviously she could not sustain, of showing *not only* that her disregard of the rule was *probably not* a contributory cause of the collision, *but that it could not have been.*

Collision, 11 *Corpus Juris,* 1181.

Brief for appellant, page 8, states that the *existence* of this rule was denied in the answer to the libel, and that such denial was "intended" to raise the issue "whether or not the State Board of Harbor Commissioners *had power* to make the regulation. *But no such point was made in the District Court.* On the contrary:

> "The COURT. Is there going to be any dispute over this rule?
>
> Mr. EVANS. *No dispute over the existence of the rule"* (36).

The only contention below, as is apparent from appellant's opening statement that "it is our contention that the rule *does not apply in the present instance"* (35), was that because the "Pyramid" was bound from one dock to another, the rule was inapplicable.

A point not raised below, nor presented by the pleadings cannot be raised for the first time in this Court:

The Lydia, 1924 A. M. C. 1001; 1 Fed. (2nd) 18, C. C. A. 2.

> "One may not try a case upon one theory, and then reverse the judgment against him in the appellate court upon another and inconsistent theory, which was not presented, urged, or tried in the court below."

Lesser Cotton Co. v. St. Louis, etc., 114 Fed. 142, C. C. A. 8.

A further answer to this new suggestion of appellant would be that *the rule is obviously within the rule-making powers of the Harbor Commissioners* as defined in the very quotation from the Political Code, quoted on page 8 of appellant's brief. Moreover, there was nothing before the lower Court and there is nothing before this Court to show by virtue of what power the rule was made, and it cannot thus be *collaterally* attacked—particularly when appellant carefully refrained below from asking the *secretary of the board* a word about its adoption (37, 38).

It is too clear for argument that the rule applied to the "Pyramid" under the circumstances at bar. The argument on pages 9 to 13 of appellant's brief is palpably unsound. Mr. Byrne *did not* testify that the rule did not apply to vessels navigating for short distances along the piers, but merely said that *no complaint* had been made to the board *of violations* of the rule by vessels running a shorter distance along the pierhead line (38). The "best way to handle a boat" in going from one pier to another pier a short distance

away *is to back out "500 feet or more" and then go ahead into the new berth* (49). Reference to the chart will demonstrate that the quickest and safest way for the "Pyramid" to have reached pier 25, for which she was bound, would have been to back 500 feet or more out of pier 17 and then proceed into pier 25. No doubt, the *reason* that no complaints had been received by the board was because *other* vessels observed the rule by so navigating.

2. So Violating Inland Rule 29 Governing "Special Circumstances".

Aside from the harbor rule, it is agreed that the situation is one of "special circumstances" (Appellant's Brief 13). It is evident from what has been said, that the manner in which the "Pyramid" attempted to get from her berth at pier 17 to a berth at pier 25 was dangerous, and that she was grossly negligent, without excuse, in shaving the end of pier 21, as heretofore described, *from 10 feet to less than 50 feet therefrom.*

Judge Hoffman, as early as 1883, in this District, held that a steamer, although at a moderate rate of speed, proceeding *within 100 feet of the San Francisco pier ends* was *solely responsible* for a collision with a small steamer backing from her berth at one of them, saying:

> "If she was, as the answer alleges, between 100 and 150 feet distant from them, *then the result proves that between 100 and 150 feet was too near.*"
>
> *McFarland v. Selby Smelting Co.,* 17 Fed. 253 at 256, N. D. Cal.

Quoting from a then recent case, he said further:

> "In the recent case of The Monticello, 15 Fed. Rep. 474-476, the Court observes:
>
> 'The state statute which requires steamers to proceed in the middle of the stream, the local rules, and repeated decisions of the courts, *all unite in condemning navigation so near to the slips as dangerous and unjustifiable. The matter has been so repeatedly discussed, and the obligation of steamers to keep away from the ends of wharves and ferry-slips so forcibly stated,* that it is wholly unnecessary to repeat it here.' The Relief, 01c. 104; The Favorita, 18 Wall. 598, 601, 602; 8 Blatchf. 539, 541; 1 Ben. 30-39." *Ibid.*

It follows that for a vessel to proceed within *from 10 to 50 feet* of the pier ends, *on an oblique course,* is grossly negligent.

No further authority than the decision of Judge Hoffman, never overruled, is necessary to fix fault on the "Pyramid". But were it essential, the decision of the Circuit Court of Appeals for the Second Circuit *in reversing a case much relied upon by appellant* (Brief for Appellant 22, 23) would be conclusive. In that case the *District Court* held that both the vessel shaving the pier ends and the vessel coming out of the slip were responsible for the collision. *The Circuit Court of Appeals held that the vessel shaving the pier ends was solely at fault, saying of the ferryboat leaving the slip:*

> "We find no evidence of excessive or unusual speed; the nature of collision negatives that. The steamer was going slow enough to avoid anything at the pier, and that was not flagrantly violating the law. As for the lookout, he was in place before anything could be seen north of the line of slip,

and he saw the schooner as soon as any one could see it. The ferryboat was without fault."

S. A. Carpenter, 18 Fed. (2nd) 99; 1927 A. M. C. 638, C. C. A. 2.

This Court is respectfully requested *to carefully read the whole* of that case, as it is uniquely in point here.

There are innumerable other decisions holding vessels solely in fault for shaving pier ends, of which the following are typical, and in point in the instant case:

R. H. Williams, 46 Fed. 414, E. D. N. Y.;
Alvena, 78 Fed. 819 at 822, S. D. N. Y., Brown, J.;
Breakwater, 155 U. S. 252; 39 L. Ed. 139;
John Arbuckle, 185 Fed. 240, C. C. A. 2;
Transfer No. 12, 189 Fed. 549, D. C. N. J.;
Transfer No. 8, 211 Fed. 965, C. C. A. 2;
Bangor, 212 Fed. 706, C. C. A. 2;
Guiding Star, 1923 A. M. C. 243, S. D. N. Y.;
Commander, 1923 A. M. C. 834, S. D. N. Y.;
Scandinavia, 1924 A. M. C. 700, S. D. N. Y.;
James J. McAllister, 1925 A. M. C. 800, E. D. N. Y.

Indeed, vessels running too close to pier ends were held in fault in the decisions cited in appellant's brief:

Cotopaxi, 20 Fed. (2nd) 568; 1927 A. M. C. 1383, C. C. A. 2;
Fearless, 156 Fed. 428, D. C. Pa.;
Moran, 254 Fed. 766, C. C. A. 2.

As the District Court said, for the "Pyramid" to proceed so close to the ends of *covered* piers, *masked* by them, set a *trap* for vessels proceeding from the slip (70). The fact that she was not properly answering her helm (58) made it all the more inexcusable for her to proceed along the pier heads:

S. A. Carpenter, supra.

B. In Blowing a Misleading Whistle, if Any.

The only whistles of the "Pyramid" heard by the "Four Sisters" were the four short blasts blown just as the vessels came together (43, 47). Davis, the only *disinterested* witness in the case (57) *heard no other* whistles from the "Pyramid" (54, 55, 56).

But the "Pyramid's" master claims to have blown two whistles before the four: one long blast *as she backed out of pier 17* (58) and a second blast when she was *abreast of pier 19* (58, 63). Her *engineer,* however, mentions only the four (64-66), as does *her only other witness,* a deck-hand (66-69).

If the "Pyramid" blew the two other whistles to which her master testified, the first was the usual "slip whistle" blown as she left pier 17 (58, 61), which both the answer to the libel, and the cross-libel fix at 7:35 A. M. (17, 22); and the second was blown when she was off pier 19 (63), very considerably later. It may here be noted that, while both the answer and the cross-libel admit that the collision happened at 7:45 A. M. (14, 16, 22), as alleged in the libel (8), her engineer says she did not leave pier 17 until 7:55 (64), and that her log showed the collision at 8:10 or 8:05 (65).

The District Court properly held (70) that, under the circumstances, these two widely separated whistles, even if heard, *not only would not have given any warning that the "Pyramid" was shaving the pier head of 21, but would have misled the "Four Sisters" into believing that the "Pyramid" was entering or leaving another slip.* It also properly held that the only whistle from her which by any possibility could have warned the "Four Sisters" of her dangerous maneuver would have been a rapid series of whistles, indicating danger.

The specious character of appellant's argument on pages 15 to 18 of its brief requires no demonstration. It is significant that appellant's brief cites no authority for it. Rule V (Brief for Appellant, 15, 16) prescribes only whistles for vessels "nearing a short bend or curve, in the channel" and for vessels moving "from their docks", in neither of which situations was the "Pyramid". Her own master said that the first whistle to which he testified indicated that she was *leaving pier 17* (58, 61), and that the second, blown off pier 19, indicated that she was *entering a dock* (63). Of course, the "Four Sisters" was not in sight when she blew either the first or the second.

C. In Throwing Her Bow to Port Upon Sighting the "Four Sisters".

The master of the "Pyramid" testified that when he saw the "Four Sisters" he reversed to full speed astern and ported his helm, *so making "her bow swing to port"* (63). She could not have done anything more effectual to trap the "Four Sisters" than to thus throw her bow *toward her.* It is to be remembered

that *the "Pyramid" is 161 feet long* (7, 12). When her bow bobbed around the corner of pier 21, if the "Four Sisters" had continued on her course she unavoidably would have run into the "Pyramid", and if the "Four Sisters" had thrown her bow to starboard she would have run into pier 21. *She did the only thing that was possible to avoid collision: backed and at the same time swung her bow to port* (42, 48, 69). The "Pyramid" by throwing *her* bow to port negatived the effect of this proper move of the "Four Sisters" *in extremis.*

Hampton, on the other hand, says that the "Pyramid" neither backed nor changed her course before the collision (43, 47, 48), and Davis does not think she changed her course (56). In that event the "Pyramid" was at fault *for not backing and for not throwing her bow to starboard* to avoid the collision.

Cotopaxi, 20 Fed. (2nd) 569; 1927 A. M. C. 1383, C. C. A. 2;

Moran, 254 Fed. 766, C. C. A. 2.

III.

THE "FOUR SISTERS" WAS NOT AT FAULT.

Appellant's brief charges the "Four Sisters" with three faults, which may be very shortly shown to be without the slightest foundation. *"But the offending vessel always accuses",* as Judge Kerrigan quoted, before stating the following principle, with which this Court is familiar:

> "Significantly, the rule laid down repeatedly by the *Supreme Court* is, that where fault on the part

> of one vessel is obvious and inexcusable, the evidence to establish that of another must be clear and convincing to make out a case for apportionment (citing cases)."
>
> *Munrio-Tejon,* 1926 A. M. C. 639 at 643, N. D. Cal.

Here the faults of the "Pyramid" are so numerous, so glaring, and so fully account for the collision that the case is *precisely* within that rule. Moreover, the record *positively* shows that the "Four Sisters" was wholly innocent.

A. The Whistle of the "Four Sisters" Was Efficient and the Signal Blown Upon it Proper.

The record conclusively shows that the "Four Sisters'" whistle was efficient. Hampton said it was an efficient whistle (45), that it had been recently inspected and required no repairs (45, 46). This the certificate of inspection of the United States inspectors confirms (40, 41). The disinterested Davis, on pier 23 near the bulkhead, heard it when it was blown "farther out than half way" (53, 54, 57). *The "Pyramid's" master conclusively proved its efficiency by testifying that in the afternoon of the same day on which the collision occurred he heard it "a quarter of a mile" away* (60).

> *John Arbuckle,* 185 Fed. 240 at 243-4, C. C. A. 2;
>
> *R. H. Williams,* 46 Fed. 414, E. D. N. Y.

It is significant that *neither the engineer nor the deck-hand* of the "Pyramid", although called as witnesses, testified *that they did not hear* the whistle, *admittedly* blown by the "Four Sisters" (64-69). The

only witness for the "Pyramid" therefore, who *said he did not hear* the "Four Sisters'" whistle is the "Pyramid's" master (59). W. H. Larkin (one of several stevedores on the "Four Sisters" 49, 50, 51) did not hear it for the very good reason that he was in the noise of the "Four Sisters'" engine room, reading the paper and paying no attention (52).

Appellant's other criticism of the whistle is that it should have been blown *later* than it was blown. Davis said that when she blew the whistle he was *"farther out than half way"* (53). Hampton pointed on the chart to the point *(unmarked)* where she was when it was blown, and described it as "about half way down" (45). It was a *"long blast* of the whistle" (42), *so that by the time it was completed she was much further out.*

> "The act does not fix any precise time at which this signal is to be blown. The time would apparently depend upon the circumstances of the case, e. g., if the vessel were lying high up in a deep dock or if her exit were obstructed by other vessels, notice *might be more effective if given after than before she began to move."*
>
> *Bangor,* 212 Fed. 706, C. C. A. 2.

It is submitted that no more proper point to blow the long blast on the whistle could have been chosen than the place where it was sounded; and had it been deferred until a later time appellant would now be protesting *because it was not blown sooner.*

B. The Speed of the "Four Sisters" Was Proper.

Davis testified that the "Four Sisters" was proceeding *"3 or 4 miles an hour"* (53). Hampton said she

left at *half speed* (42) and did not change (45), and that her half speed is *"about 5 miles an hour"* (45). Such a speed, on an admittedly "clear and fair" day (8, 13, 23) was certainly not excessive. It was no faster than a man can walk. *Judge Brown said that 6 or 7 knots per hour* would be a proper speed for a ferry in going out of a slip:

Chicago, 78 Fed. 819 at 823, D. C. N. Y.

Furthermore, any speed of the "Four Sisters" did not contribute to the collision. She would have avoided the collision by backing and throwing her bow to port, but for the gross faults of the "Pyramid". As the District Judge pointed out, in proceeding out of the slip the "Four Sisters" *had a right to rely upon proper navigation by other vessels:*

> "The steamer was going slow enough to avoid anything at the pier, and that was not flagrantly violating the law."
>
> *S. A. Carpenter,* 18 Fed. (2nd) 99; 1927 A. M. C. 638, C. C. A. 2.

It hardly lies in the mouth of the "Pyramid", which *improperly was shaving the pier heads at a speed of 3 1/2 to 4 miles per hour* (59) to criticise the "Four Sisters" for *properly coming out of her slip at the same speed.*

Transfer No. 8, 211 Fed. 965, C. C. A. 2.

C. The "Four Sisters" Maintained a Proper Lookout. In Any Event the Absence of Another Lookout Did Not Contribute to the Collision.

The day was fair and clear, as heretofore noted. The "Four Sisters" certificate of inspection shows that she

was a one man boat (40, 41). Hampton was this man, and was in the pilot house, looking forward, his eyes 12 feet above the deck, and nothing to obstruct his vision (49). The only other men on board were stevedores (49, 50, 51).

The Court is here respectfully requested to look at the photograph of the "Four Sisters", in evidence as Exhibit 3 (41) which clearly shows where Hampton was. It is evident from it that no bow lookout was necessary on a clear day.

In any event, *the absence of a bow lookout had nothing to do with the collision,* as the District Judge pointed out. Hampton saw the bow of the "Pyramid" *the moment it "bobbed around" the northeast corner of pier 21* (42, 45) and immediately threw his own bow to port and backed (42, 48, 69). A lookout in the bow *could not have seen the "Pyramid" any sooner.* It is to be remembered that pier 21 was *covered by a building* to the end, so high that no one on either vessel could see over it, or, of course, around it (50). *The bow of the "Four Sisters", it must be remembered, had not passed the end of pier 21, but was about 60 feet west of it* (59, 46, 47, 55) *when the "Pyramid" "bobbed around" the end of it. It was therefore not visible from the bow of the "Four Sisters' any sooner than it was from her pilot house.* Said the bow lookout of the "Pyramid":

> "Q. Where was *your boat* when you first saw the 'Four Sisters'?
>
> A. *The first I saw of the boat was about even with the north-end corner of 21.*
>
> Q. Where was the 'Four Sisters'?
>
> A. *The 'Four Sisters' was about down here"* (67).

Of the two vessels, only the "Pyramid" had passed by pier 21.

Precisely in point is the already mentioned decision of the Circuit Court of Appeals *reversing* the District Court holding relied upon in appellant's brief, pages 22, 23:

> "The ferry boat *could not* see any portion of the schooner *until clear of the pier head,* and, *when clearing,* her forward lookout saw the schooner '15 or 20 feet away' drifting down. Engines were promptly reversed * * *".
>
> "As for the lookout, he was in place before anything *could* be seen north" (here south) "of the line of the slip, and he saw the schooner *as soon as anyone could see it.* The ferry boat was without fault."
>
> *S. A. Carpenter,* 18 Fed. (2nd) 99; 1927 A. M. C. 638, C. C. A. 2.

So is another decision cited in appellant's brief, page 23, wherein District Judge Chatfield said:

> "Neither boat had a lookout stationed directly at the bow, but the captain of the 'Edouard Alfred' claims that he saw the 'Livingston' *at about the time her bow actually came out from behind the pier and her pilot house showed in front of the pier shed. The absence of a lookout on the 'Edouard Alfred', therefore, made no difference in the situation."*
>
> *Edouard Alfred,* 261 Fed. 680 at 683;
>
> *M. Moran,* 254 Fed. 766 at 767, C. C. A. 2; appellant's brief, p. 13.

The evidence is clear that *the "Four Sisters" saw the "Pyramid" as soon as the "Pyramid" saw the "Four Sisters",** notwithstanding the "Pyramid" as-

*"Neither vessel was aware of the proximity of the other until a few seconds before the impact."
Brief For Appellant, p. 2

serts that she had a lookout in the bow. This is proved by the testimony and pleadings concerning the sounding of the danger signal by the "Pyramid". It was sounded immediately when she saw the "Four Sisters" (14, 17, 23, 58, 67, 68); and this was practically simultaneous with the collision (43, 47, 54, 55, 56, 64, 68). It is also proved by the testimony and pleadings showing that each vessel saw the other at the same distance away (17, 23, 46, 47, 59, 67).

It is respectfully submitted that the interlocutory decree should be affirmed, with costs to appellee.

Dated, San Francisco,
March 17, 1928.

BELL & SIMMONS,
W. S. ANDREWS,
GOLDEN W. BELL,
Proctors for Appellee.